YEOH JIN AIK & ANOR v. HSBC BANK (MALAYSIA) BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: W-02(NCC)(W)-2056-11-2016 &
W-02(NCC)(W)-2057-11-2016]
30 MARCH 2018

BANKING: *Banker and customer – Forgery – Act of forgery by bank's employee – Whether losses to customers attributed to act of forgery – Mere silence of customers upon receipt of statements – Whether defence of estoppel or acquiescence available to bank – Effect of forgery – Whether vitiated mandate given by customers – Whether rendered investments by customers unauthorised – Whether bank could commit forgery – Whether bank liable for acts of employee as its agent*

The issue for consideration in this case was whether estoppel or acquiescence was available as a defence to the bank, in respect of losses incurred by the bank's customers ('the appellants/plaintiffs'), as a consequence of forgery committed by the bank's own employee in executing, *inter alia*, account opening forms in relation to a portfolio of investments. The estoppel relied on by the bank by way of defence to the forgery in this appeal were: (i) clauses in the bank's Investment Instruction Form which authorised investment transactions; and (ii) monthly statements issued by the bank to both its customers, setting out the transactions that were undertaken on their behalf by the bank over a period of some three years. The bank's employee, Carren Wong, the relationship manager delegated to manage the customers' portfolio of accounts, was found to have forged the customers' signatures on various banking documentation including the unit trust account opening forms, and other ancillary documents. A large number of banking documents particularly the unit trust account opening forms and terms and conditions, business guide, the top-up documentation and the switch from PCF to PruAsia Select Fund were found to have been forged. Notwithstanding the finding of forgery by the bank's own employee, the trial judge held that estoppel and/or acquiescence comprised a good defence to the plaintiffs' claims for losses. Hence, the appeal by the plaintiffs', whilst, the bank cross-appealed on the finding that the signatures on other requisite banking documentation was not those of the customers, and had been forged by the bank's employee.

Held (allowing appeals and dismissing cross appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The finding of forgery was evidenced by the bank's own employees who had all agreed that the signatures clearly mismatched. Further, the expert report also supported high probability of forgery. Hence, the cross-appeal on the finding of forgery was dismissed. (para 8)

(2) The issues of forgery and the PCF fund not being capital guaranteed to the knowledge of the plaintiffs were intertwined, both in terms of fact and law. The issue of forgery was a fundamental issue that affected the plaintiffs' mandate given to the bank. The effect of the forgery was to vitiate the mandate given by the plaintiffs because they had not in fact given their consent or authorisation for investment in the PruAsia Select Fund, or for any such switching to this fund or any top up. It was Carren Wong, and not the plaintiffs, who had consented or authorised the transaction. To that extent all those investments were unauthorised. (para 16)

(3) The plaintiffs could not have known that the PCF Fund was not capital guaranteed because the account opening forms for this investment fund contained the forged signatures of the plaintiffs. Neither could they have authorised investments in the accounts. Therefore, the loss could not be attributed to the fact that the subject fund was not capital guaranteed. The probable cause of the loss was the forgery of the primary essential documents relating to the investment. (paras 18 & 20)

(4) The fact that the plaintiffs did not protest or object over a period of three and a half years when the bank's statements were received by them, did not amount to an estoppel or acquiescence. The mere silence on the part of the plaintiffs upon receipt of statement was insufficient to amount to an estoppel because: (i) there was no representation from the plaintiffs; and (ii) the bank was not induced as a consequence of their silence to act to its own detriment. On the contrary, it was the plaintiffs who had suffered loss and detriment. (paras 21-23)

(5) The trial judge erred in holding that the bank was unable to commit forgery because it is a 'personal' offence. The bank is a 'person' for the purposes of the Interpretation Acts 1948 and 1967 and the Penal Code. Further, in view of the finding that Carren Wong, as the relationship manager and thereby, an employee of the bank, had committed forgery, it followed that the bank, as principal, was liable for the acts of its employee, who was the agent. She was acting well within the scope of her authority when she committed the forgery. (paras 25 & 26)

(6) The relevant exclusion or non-reliance clauses relating to the PruAsia Fund were contained in the documents that were forged and the plaintiffs did not have sight of the documents or the relevant prospectuses or brochures. Therefore, the plaintiffs could not have knowledge of the documents and hence, the clause could not bind them. Moreover, the clause excluded liability for information or recommendations made by employees of the bank. It did not expressly exclude liability for the forgery of its employees. (para 27)

***Bahasa Malaysia** Headnotes*

Isu untuk pertimbangan dalam kes ini adalah sama ada estopel atau persetujuan sedia ada sebagai pembelaan untuk bank, berhubung kerugian yang dialami oleh pelanggan bank ('perayu/plaintif-plaintif'), akibat pemalsuan yang dilakukan oleh pekerja bank dalam melaksanakan, antara lain, borang membuka akaun berkaitan dengan keseluruhan pelaburan. Estopel yang menjadi sandaran bank sebagai pembelaan untuk pemalsuan dalam rayuan ini adalah: (i) klausa-klausa dalam Borang Arahan Pelaburan bank yang memberi kuasa untuk transaksi pelaburan; dan (ii) penyata-penyata bulanan yang dikeluarkan oleh bank kepada pelanggannya, membutirkan transaksi yang dimasuki bagi pihak mereka oleh bank untuk tempoh kira-kira tiga tahun. Pekerja bank tersebut, Carren Wong, pengurus perhubungan yang ditugaskan mengurus sejumlah akaun pelanggan-pelanggan tersebut, didapati telah memalsukan tandatangan pelanggan-pelanggan itu pada pelbagai dokumen perbankan termasuk borang membuka akaun unit amanah dan dokumen-dokumen sampingan yang lain. Sejumlah besar dokumen bank khususnya borang-borang membuka akaun unit amanah dan terma-terma dan syarat-syarat, panduan perniagaan, dokumen penambahan dan penukaran daripada PCF kepada PruAsia Select Fund didapati telah dipalsukan. Walaupun terdapat dapatan pemalsuan oleh pekerja bank itu sendiri, hakim bicara memutuskan estopel dan/atau persetujuan membentuk pembelaan yang baik terhadap tuntutan plaintif-plaintif untuk kerugian. Oleh itu, rayuan ini oleh plaintif-plaintif, manakala, bank merayu balas atas dapatan bahawa tandatangan pada dokumentasi lain bank yang perlu bukan milik pelanggan-pelanggan itu, dan dipalsukan oleh pekerja bank.

Diputuskan (membenarkan rayuan-rayuan dan menolak rayuan balas) Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Dapatan pemalsuan dibuktikan oleh pekerja-pekerja bank itu sendiri yang kesemuanya menyetujui bahawa tandatangan-tandatangan tersebut jelas tidak berpadanan. Selanjutnya, laporan pakar juga menyokong kemungkinan besar pemalsuan. Oleh itu, rayuan balas atas dapatan pemalsuan ditolak.

(2) Isu-isu pemalsuan dan dana PCF tidak dijamin modal pada pengetahuan plaintif-plaintif adalah berkait, kedua-duanya dari segi fakta dan undang-undang. Isu pemalsuan adalah isu asas yang menjejaskan mandat yang diberi plaintif-plaintif kepada bank. Kesan pemalsuan adalah pembatalan mandat yang diberi plaintif-plaintif kerana sebenarnya mereka tidak memberi persetujuan atau kuasa untuk pelaburan dalam Dana PruAsia Select, atau untuk mana-mana penukaran dengan dana ini atau untuk apa-apa penambahan. Carren Wong dan bukan plaintif-plaintif yang memberi persetujuan atau memberi kuasa untuk transaksi tersebut. Setakat itu, kesemua pelaburan tersebut dibuat tanpa kebenaran.

(3) Plaintif-plaintif tidak mungkin mengetahui bahawa Dana PCF tidak dijamin modal kerana borang-borang membuka akaun untuk pelaburan dana ini mengandungi tandatangan plaintif-plaintif yang dipalsukan. Mereka juga tidak mungkin telah meluluskan pelaburan-pelaburan dalam akaun-akaun tersebut. Oleh itu, kerugian tidak boleh dikatakan disebabkan oleh fakta bahawa dana tersebut tidak dijamin modal. Sebab yang mungkin untuk kerugian tesebut adalah pemalsuan dokumen-dokumen asas penting berkait dengan pelaburan tersebut.

(4) Fakta bahawa plaintif-plaintif tidak membantah atau membangkang selama tempoh tiga setengah tahun apabila penyata-penyata bank diterima mereka, tidak membentuk estopel atau persetujuan. Tindakan plaintif-plaintif berdiam diri semata-mata setelah menerima penyata tersebut tidak mencukupi untuk membentuk estopel kerana: (i) tiada representasi daripada plaintif-plaintif; dan (ii) bank tidak didorong oleh tindakan berdiam diri mereka untuk bertindak untuk kerugiannya sendiri. Sebaliknya, plaintif-plaintif yang mengalami kerugian dan kemudaratan.

(5) Hakim bicara terkhilaf apabila memutuskan bank tidak boleh melakukan pemalsuan kerana ini adalah kesalahan 'persendirian'. Bank adalah 'orang' bagi maksud Akta Tafsiran 1948 dan 1967 dan Kanun Keseksaan. Selanjutnya, memandangkan dapatan bahawa Carren Wong, sebagai pengurus perhubungan dan dengan itu, pekerja bank, telah melakukan pemalsuan, berikutan itu bank, sebagai prinsipal, bertanggungan untuk tindakan-tindakan pekerjanya yang merupakan ejennya. Carren Wong bertindak dalam ruang lingkup kuasanya apabila melakukan pemalsuan tersebut.

(6) Klausa-klausa pengetepian atau bukan sandaran berkaitan Dana PruAsia terkandung dalam dokumen-dokumen yang dipalsukan dan plaintif-plaintif tidak melihat dokumen-dokumen tersebut atau prospektus-prospektus atau risalah-risalah yang relevan. Oleh itu, plaintif-plaintif tidak mungkin mempunyai pengetahuan tentang dokumen-dokumen tersebut dan dengan itu, klausa tersebut tidak boleh mengikat mereka. Malahan, klausa tersebut mengetepikan liabiliti untuk maklumat atau cadangan-cadangan yang dibuat oleh pekerja-pekerja bank. Ini tidak mengecualikan secara langsung liabiliti untuk pemalsuan oleh pekerja-pekerjanya.

Case(s) referred to:
Greenwood v. Martins Bank Ltd [1933] AC 51 ***(refd)***
Jiang Ou v. EFG Bank AG [2011] SGHC 149 ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1985] 2 All ER 947 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 3

For the appellants - M Thayalan; M/s Thayalan & Assocs
For the respondent - Benjamin Dawson, Ooi Ai Yen, Ng Juen Yee & Quay Hui Shien; M/s Benjamin Dawson

*[**Editor's note:** Appeal from High Court, Kuala Lumpur; Suit No: 22NCC-497-12-2014 (overruled).]*

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan JCA:

[1] The singular issue for consideration in this case is whether estoppel or acquiescence is available as a defence to a bank in respect of losses incurred by the bank's customers, as a consequence of forgery committed by the bank's own employee in executing, *inter alia*, account opening forms in relation to a portfolio of investments?

[2] In other words, can a bank invoke estoppel or acquiescence to exculpate itself of liability for losses suffered, as a consequence of the forging of documentation by the bank's own employee?

[3] The estoppel relied on by the bank by way of defence to the forgery in the instant appeal comprises:

(a) Clauses in the bank's investment instruction form which authorise investment transactions; and

(b) Monthly statements issued by the bank to both its customers setting out the transactions that were undertaken on their behalf by the bank over a period of some three years.

[4] The trial judge found that estoppel and/or acquiescence comprised a good defence to the customers' claims for losses, notwithstanding forgery by the bank's own employee.

[5] The customers who comprise the appellants in the two appeals before us contend otherwise, hence the present appeals. The bank has filed a cross-appeal maintaining that while the learned trial judge was correct in concluding that the bank was not liable, nonetheless the learned trial judge had erred in finding that the signatures on other requisite banking documentation were not those of the customers, and had been forged by the bank's employee, who was the relationship manager delegated to manage and take care of these customers' portfolio of accounts.

[6] Having perused the appeal records and considered the submissions, we are of the unanimous view that the appeals should be allowed and the cross-appeal dismissed for, *inter alia*, the reasons set out below.

[7] There is a clear finding of fact by the learned trial judge that the bank's employee, Carren Wong (PW7), the relationship manager of the plaintiffs, had forged the plaintiffs' signatures on various banking documentation including the unit trust account opening forms, and other ancillary documents. A large number of banking documents particularly the unit trust account opening forms and terms and conditions, business guide, the top-up documentation and the switch from PCF to PruAsia Select Fund were found to be forged by the learned trial judge.

[8] We have considered the submissions of learned counsel for the bank in relation to the cross-appeal and are not persuaded that we should interfere with the clear findings of fact. We are bolstered in our view by a consideration of the evidence of the bank's own employees who all agreed that the signatures were clearly mismatched. Further to this, the expert report also supports the high probability of forgery. It cannot be said in these circumstances that the learned judge was 'plainly wrong' in her conclusion. Therefore we dismiss the cross-appeal on the finding of forgery.

[9] Having concluded that forgery has been established, it now falls to be considered whether, the learned judge was correct when she held *inter alia* that: "The finding of forgery of the plaintiffs' signatures does not negate a concurrent finding of fact that the plaintiffs were aware that the PCF investment is not capital guaranteed". She further concluded that the issue of forgery and whether the plaintiffs were aware of the PCF investment not being capital guaranteed are two independent and discrete issues.

[10] She also found that the cause of the plaintiffs' loss was not the forgery but rather that the PCF was not capital guaranteed.

[11] Her Ladyship further speculated that even if the signatures were forged, but if the fund were capital guaranteed, the plaintiffs would not have suffered loss and would not have complained.

[12] She concluded that the plaintiffs were not entitled to a declaration that the bank had committed forgery because forgery is a "personal" offence and accordingly the bank could not be responsible for the forgery.

[13] Finally, the learned trial judge also concluded that the bank was not liable contractually by reason of the non-reliance clause in the investment instruction form, which was signed by the plaintiffs. That clause reads as follows:

> I/We also confirm that I/we independently and without reliance on the Bank made my/our own judgment and decision with respect to the investments. The Bank shall be under no liability whatsoever in respect of any information or recommendation rendered by any of its employees irrespective of whether or not such recommendation was given.

[14] Her Ladyship also found that the cause of action founded in misrepresentation as pleaded by the customers also failed for failure to establish the essential ingredient of an intention to deceive on the part of the relationship manager.

[15] We are of the view that the learned judge fell into grave error when she made these findings and conclusions.

[16] Firstly, we do not concur with the learned trial judge that the issues of forgery, and the PCF fund not being capital guaranteed to the knowledge of the plaintiffs, are two separate and discrete issues. On the contrary, the two matters are intertwined both in terms of fact and law. The issue of forgery is a fundamental issue that affects the plaintiffs' mandate given to the bank. The effect of the forgery is to vitiate the mandate given by the plaintiffs (see *Jiang Ou v. EFG Bank AG* [2011] SGHC 149). This is because the customers had not in fact given their consent or authorisation for investment in the PruAsia Select Fund, or for any such switching to this fund or any top-up either. It was Carren Wong and not the plaintiffs who had consented or authorised the transaction. To that extent all those investments were unauthorised.

[17] It is not possible to sever the forgery from the far less important issue of whether or not the plaintiffs were aware that the PruAsia Select Fund was not capital guaranteed. The latter is merely an ancillary point whereas the fundamental or primary issue is the fact of, and consequences of the forgery.

[18] On the issue of the cause of the plaintiffs' loss, the learned judge also erred in stating that the loss was caused by reason of the PCF Fund not being capital guaranteed, rather than the forgery. It is apparent that the plaintiffs could not have known that the PCF Fund was not capital guaranteed because the account opening forms for this investment fund contains the forged signatures of the plaintiffs. If their signatures were forged, they could not know whether it was capital guaranteed or not. Neither could they have authorised investments in the accounts. This deals with the switching of accounts from Prudential Country Fund to PruAsia Select Fund.

[19] This applies equally to the top up transactions, where the documentation was similarly forged.

[20] Therefore the loss could not be attributed to the fact that the subject fund was not capital guaranteed. The probable cause of the loss is the forgery of the primary essential documents relating to the investment. The evidential record supports our conclusion.

[21] The fact that the plaintiffs did not protest or object over a period of three and a half years when the bank's statements were received by them, does not amount to an estoppel or acquiescence (see *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1985] 2 All ER 947, [1985] 2 Lloyds Rep 313, [1985] 3 WLR 317, [1986] AC 80, Bailii, [1985] UKPC 22) (Hong Kong)).

A "Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: see *Greenwood*'s case [1933] AC 51 at 57, [1932] All ER Rep 318 at 321. And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of estoppel is a representation
B (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss" (see *Greenwood*'s case, above).

[22] Here, mere silence on the part of the plaintiffs upon receipt of statements is insufficient to amount to an estoppel because:

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(i) There was simply no representation from the plaintiffs;

(ii) The bank was not induced as a consequence of their silence to act to its own detriment.

[23] On the contrary, it was the plaintiffs who have suffered loss and
D detriment.

[24] On the speculation that if the PruAsia Select Fund was in fact capital guaranteed, the plaintiffs would not have complained about the forgery because they would not have suffered loss, Her Ladyship had no evidential basis on which to make such a speculative finding.

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[25] With respect to the bank being unable to commit forgery because it is a "personal" offence, the learned trial judge erred because the bank is a person for the purposes of the Interpretation Acts 1948 and 1967 (see s. 3) where a person is defined to include "... a body of persons, corporate or
F incorporate" and the Penal Code where the definition of a person includes "... any company or association or body of persons, whether incorporated or not'.

[26] Further, and in any event, in view of the finding that Carren Wong (PW7) as the relationship manager and thereby an employee of the bank had
G committed forgery, it follows that the bank, as principal, is liable for the acts of its employee, who is the agent. She was moreover acting well within the scope of her authority when she committed such forgery.

[27] On the issue of the exclusion or non-reliance clause, the evidence discloses that the relevant clauses relating to the PruAsia Fund were
H contained in the documents that were forged. The plaintiffs did not sight these documents. Neither did they sight the relevant prospectuses or brochures. Therefore the plaintiffs could have no knowledge of these documents, far less the non-reliance or exclusion clause. It follows that this clause cannot therefore bind them. Moreover the clause excludes liability for
I information or recommendations made by employees of the bank. It does not expressly exclude liability for the forgery of its employees.

[28] Finally, on the issue of a lack of evidence of an intention to deceive on the part of Carren Wong (PW7) in order to establish misrepresentation, the learned judge erred because that is not an essential ingredient in establishing misrepresentation under the Contracts Act 1950 or the common law, in a civil law action.

[29] For these reasons, we are satisfied that appellate intervention is required and we therefore allow both appeals with costs. We also dismiss the cross-appeal with costs.

[30] The High Court orders are set aside.